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## Recent Developments in Land Use and Environmental Law

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# Recent Developments in Land Use and Environmental Law

## **Cover Page Footnote**

The Recent Developments Section was researched and written by Leslie Bryson, J.D., The Florida State University College of Law (expected 2001).

# RECENT DEVELOPMENTS IN LAND USE AND ENVIRONMENTAL LAW\*

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## I. INTRODUCTION

This section highlights recent developments in federal and state environmental and land use case law, as well as notable legislation pending before the Florida Legislature. In addition to the sources cited in this section, the reader is encouraged to consult the official website of the Florida Legislature at <[www.leg.state.fl.us](http://www.leg.state.fl.us)>, and the Florida Department of Environmental Protection's website at <[www.dep.state.fl.us](http://www.dep.state.fl.us)>. Other useful sources the reader may wish to consult include the web site of the Environmental Land Use Section of the Florida Bar, <[www.eluls.org](http://www.eluls.org)>, and the FLORIDA ENVIRONMENTAL COMPLIANCE UPDATE, available through M. Lee Smith Publishers, LLC, <[www.mleesmith.com](http://www.mleesmith.com)>.

## II. FEDERAL DECISIONS

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*,  
120 S. Ct. 693 (2000).

On January 12, 2000, the U.S. Supreme Court reversed the Fourth Circuit Court of Appeals, holding Friends of the Earth's (FOE) citizen suit was not rendered moot when the defendant company, Laidlaw Environmental Services (TOC), came into substantial compliance with the permit requirements.<sup>1</sup> The U.S. Supreme Court remanded the case to the district court for factual determinations about the effect of Laidlaw's compliance with the permit requirements and

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\* The Recent Developments Section was researched and written by Leslie Bryson, J.D., The Florida State University College of Law (expected 2001).

1. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 120 S. Ct. 693, 700 (2000).

closure of its facility,<sup>2</sup> as well as for consideration of the issue of attorneys' fees.<sup>3</sup>

The Clean Water Act provides that the Administrator of the Environmental Protection Agency (EPA), or a state program authorized by the EPA, may issue a National Pollutant Discharge Elimination System (NPDES) permit.<sup>4</sup> Once issued, a NPDES permit allows for the discharge of pollutants into navigable waters.<sup>5</sup> An action may be brought if such a permit is violated,<sup>6</sup> and section 505 of the Clean Water Act allows private citizens to bring suit against permit violators to enforce an effluent standard or limitation.<sup>7</sup>

Laidlaw Environmental Services (TOC), Inc., operated a wastewater treatment plant in Roebuck, South Carolina.<sup>8</sup> South Carolina granted Laidlaw an NPDES permit so that it could discharge treated wastewater into the North Tyger River.<sup>9</sup> The permit placed limits on the amount of pollutants that Laidlaw was authorized to discharge into the river.<sup>10</sup> Laidlaw violated the permit limit numerous times by discharging more pollutants into the river than the permit allowed.<sup>11</sup>

On June 12, 1992, Friends of the Earth (FOE) brought suit against Laidlaw under the Clean Water Act citizen suit provision.<sup>12</sup> FOE alleged noncompliance with the NPDES permit and sought declaratory and injunctive relief and an award of civil penalties.<sup>13</sup> On January 22, 1997, the district court found that Laidlaw had committed 489 violations of permit limits for mercury and assessed a civil penalty of \$405,800 against Laidlaw for the permit violations, concluding that the penalty had a deterrent effect.<sup>14</sup> The district court denied the plaintiffs' request for injunctive relief, finding that because Laidlaw had been in substantial compliance with permit requirements since 1992, injunctive or equitable relief would not be

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2. *See id.* at 711.

3. *See id.* at 712.

4. *See* 33 U.S.C. § 1342 (1998).

5. *See id.*

6. *See id.*

7. *See id.*

8. *See Friends of the Earth*, 120 S. Ct. at 701.

9. *See id.*

10. *See id.*

11. *See id.* at 702.

12. Citizens Local Environmental Action Network, Inc., (CLEAN) was also listed as a plaintiff with Laidlaw, and Sierra Club was later added as a plaintiff. *See id.* at 702.

13. *See id.*

14. *See id.* at 610-11.

appropriate.<sup>15</sup> FOE appealed the civil penalty, arguing that it was inadequate, but did not appeal the denial of injunctive relief.<sup>16</sup>

The Fourth Circuit Court of Appeals vacated the district court's order and remanded with instructions to dismiss.<sup>17</sup> The Fourth Circuit stated that because FOE had not appealed the district court's denial of injunctive relief, the only remedy available to redress their injuries would be civil penalties payable to the U.S. Treasury.<sup>18</sup> The Fourth Circuit, citing the Supreme Court's decision in *Steel Company v. Citizens for a Better Environment*,<sup>19</sup> declared that the action was moot because the only remedy available to FOE was civil penalties payable to the U.S. Treasury.<sup>20</sup> The Fourth Circuit held that civil penalties payable only to the U.S. Treasury and not to the plaintiff could not benefit the plaintiff.<sup>21</sup> The Fourth Circuit thus determined that because civil penalties payable to the U.S. Treasury could not redress the plaintiffs' injuries, the action was moot.<sup>22</sup> On March 1, 1999, the U.S. Supreme Court granted certiorari.

In the opinion written by Justice Ginsburg, the U.S. Supreme Court held that the Fourth Circuit incorrectly concluded that the case was moot.<sup>23</sup> The Court first noted that because the Fourth Circuit determined that the case was moot, the Fourth Circuit assumed, without deciding, that FOE had standing at the outset.<sup>24</sup> The Supreme Court noted that while standing and mootness share the same underpinnings of the U.S. Constitution's case or controversy requirement in Article III, section 2, the two are distinct in their inquiries.<sup>25</sup> The Supreme Court then addressed the issue of FOE's initial standing, beginning with the injury in fact inquiry.<sup>26</sup> The Court stated that the proper focus of the standing inquiry is the injury to the plaintiff, not the injury to the environment.<sup>27</sup> The Court held that the district court properly focused on injury to the plaintiff, rather than to the environment, in finding that FOE satisfied the

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15. See *id.* at 611.

16. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 149 F.3d 303, 305 (4<sup>th</sup> Cir. 1998).

17. See *id.* at 306-07.

18. See *id.* at 306.

19. 118 S. Ct. 1003 (1998).

20. See *Friends of the Earth, Inc.*, 149 F.3d at 306.

21. See *id.*

22. See *id.* at 306-07.

23. See *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 120 S. Ct. 693, 704 (2000).

24. See *id.*

25. See *id.* at 703-04.

26. See *id.* at 704.

27. See *id.*

injury in fact requirement for standing.<sup>28</sup> The Court listed the Article III standing requirements that a plaintiff demonstrate as first, that it has suffered an "injury in fact" that is concrete and particularized, and actual or imminent; second, that the injury is fairly traceable to the defendant's challenged action; and finally, that it is likely, rather than merely speculative, that the injury will be redressed by a decision in favor of the plaintiff.<sup>29</sup> The Court recounted testimony and statements by FOE members about their desires to engage in fishing, swimming, wading and camping activities in and near the river, activities which would be inhibited because of their concerns about Laidlaw's discharges.<sup>30</sup> The Court determined that this evidence demonstrated that Laidlaw's discharges directly affected the members' recreational, esthetic and economic interests sufficiently to satisfy the injury in fact requirement of standing.<sup>31</sup> Next, the Supreme Court addressed Laidlaw's contention that FOE lacked the requirement that the injury is likely to be redressed by a favorable decision because the only remedy FOE sought was civil penalties payable to the U.S. Treasury.<sup>32</sup> Laidlaw had argued that because the only remedy FOE sought was civil penalties payable to the U.S. Treasury, and further that because civil penalties do not provide redress to private citizens because they are payable to the government, any favorable decision would not provide redress to the plaintiffs.<sup>33</sup> The Supreme Court however, held that civil penalties payable to the U.S. Treasury do provide redress to citizen plaintiffs to the extent that they discourage current violations by defendants and deter future violations.<sup>34</sup> The Court clarified that *Steel Co.* does not dictate that citizen plaintiffs have no standing to seek civil penalties under the Clean Water Act, but only that citizen plaintiffs lack standing to sue for wholly past violations.<sup>35</sup> The Court explained that the *Steel Co.* holding did not address the question of whether citizen plaintiffs have standing to seek civil penalties for violations ongoing at the time the complaint is filed and that are likely to continue in the future.<sup>36</sup>

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28. See *id.*

29. See *id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

30. See *id.* at 704-05.

31. See *id.* at 705-06.

32. See *id.* at 706.

33. See *id.*

34. See *id.* at 705-06.

35. See *id.* at 707.

36. See *id.* at 708.

Next, the Court addressed the mootness issue. The Court held that FOE's claim did not become moot when the defendant came into compliance with the permit requirements.<sup>37</sup> Rather, the standard for determining whether a defendant's voluntary conduct renders a claim moot is "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."<sup>38</sup> Furthermore, the party asserting mootness bears the burden of persuading the court that the conduct cannot reasonably be expected to occur again.<sup>39</sup> The Court determined that the Fourth Circuit confused standing with mootness when it relied upon *Steel Co.* regarding a citizen plaintiff's ability to seek civil penalties.<sup>40</sup> The Court conceded that the description of mootness as "the doctrine of standing set in a time frame" could lead to confusion.<sup>41</sup> In contrast to mootness, the plaintiff bears the burden of establishing standing by showing that the defendant's challenged conduct is likely to continue or occur in the future unless stopped by litigation.<sup>42</sup> The Court explained that there are circumstances in which the "prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."<sup>43</sup> Plus, Laidlaw's closing of a facility might make the case moot, but only if it is "absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur."<sup>44</sup> Finally, the Court held that the reimbursement of costs, including fees, is a matter for the district court to address.<sup>45</sup>

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37. See *id.* at 700.

38. *Id.* at 708 (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

39. See *id.* at 708.

40. See *id.*

41. *Id.* at 708-09.

42. See *id.* at 709.

43. *Id.*

44. *Id.* at 711.

45. See *id.* at 712.

*Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *aff'g* 39 Fed. Cl. 81 (1997), *cert. denied*, 68 U.S.L.W. 3367 (U.S. Apr. 03, 2000) (No. 99-881).

The Federal Circuit Court of Appeals held that a landowner who was denied a permit to dredge and fill wetlands on his property in the Florida Keys by the U.S. Army Corps of Engineers did not provide a showing of a reasonable, investment-backed expectation necessary to establish a taking under the Fifth Amendment.<sup>46</sup> The U.S. Supreme Court has denied certiorari.

In 1973, Lloyd Good purchased 40 acres of undeveloped land on Lower Sugarloaf Key, Florida, consisting of 32 acres of wetlands and 8 acres of uplands.<sup>47</sup> In 1980, Good began the process of obtaining the federal, state and local permits necessary to develop the land.<sup>48</sup> Good submitted his application to the U.S. Army Corps of Engineers for a permit to dredge and fill navigable waters of the United States.<sup>49</sup> In 1983, the U.S. Army Corps of Engineers granted his application for a permit to fill and excavate salt marsh acreage on the property to create a 54 lot subdivision and 48 slip marina.<sup>50</sup>

During the next ten years, Good received approval for his project from federal, state and county regulatory bodies.<sup>51</sup> But in 1989 the South Florida Water Management District recommended denial of Good's application based on total wetland loss and loss of habitat for endangered species. Good modified his project and submitted a new application with the Corps in 1990, but because of the presence of endangered species, the Corps was first required to consult with the Fish and Wildlife Service (FWS).<sup>52</sup> In 1991, FWS recommended denial because Good's 1988 and 1990 plans jeopardized the existence of the Lower Keys marsh rabbit and the silver rice rat, both endangered species.<sup>53</sup> In March 1994, the Corps denied Good's 1990 permit and notified him that his 1988 permit had expired.<sup>54</sup>

On July 11, 1994, Good filed suit in the Court of Federal Claims alleging that the Corps' denial of the permit amounted to a taking of private property without just compensation in violation of the Fifth

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46. See *Good v. United States*, 189 F.3d 1355, 1363 (Fed. Cir. 1999).

47. See *id.* at 1357.

48. See *id.*

49. See *id.*

50. See *id.*

51. See *id.* at 1358.

52. See *id.* at 1359.

53. See *id.*

54. See *id.*



Amendment.<sup>55</sup> The court granted summary judgment in favor of the government and held that there was no taking.<sup>56</sup> On appeal, Good argued that the Supreme Court in *Lucas v. South Carolina Coastal Council*<sup>57</sup> dispensed with the requirement of a reasonable, investment-backed expectation to establish a taking in cases where virtually all of the economic value of the landowner's property is eliminated.<sup>58</sup> The Federal Circuit Court of Appeals explained that this is not what the *Lucas* Court meant, and stated that "[r]easonable, investment-backed expectations are an element of every regulatory takings case"<sup>59</sup> even where the government action deprives the landowner of all economically or beneficial use of the landowner's property.<sup>60</sup> Good argued in the alternative that he did satisfy the requirement of having reasonable, investment-backed expectations of building a residential subdivision on his property, and that because he was only denied permits based upon the Endangered Species Act, which was not in existence at the time he bought his land, he could not have expected to be denied a permit based on its requirements.<sup>61</sup> The Federal Circuit Court of Appeals rejected this argument, observing that Good must have been aware of the increasing concern for environmental issues and corresponding regulatory response present in the time period between his purchase of the land and his first application for permits.<sup>62</sup> The Court also stated that at the time he bought the land, Good acknowledged that obtaining regulatory approval would be necessary and difficult, but waited several years before beginning the approval process.<sup>63</sup> Thus, the Court concluded that Good could not "fairly claim surprise when his permit application was denied."<sup>64</sup> The Court held that Good thus lacked the necessary element of a showing of a reasonable, investment-backed expectation of his ability to build a housing development on his land.<sup>65</sup>

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55. *See id.*

56. *See id.*

57. 505 U.S. 1003 (1992).

58. *See Good*, 189 F.3d 1361.

59. *Id.* (citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1179 (Fed. Cir. 1994)).

60. *See id.* at 1361.

61. *See id.*

62. *See id.* at 1361-62.

63. *See id.* at 1362.

64. *Id.* at 1363.

65. *See id.*

*Southern California Edison Co. v. Federal Energy Regulatory Commission*,  
195 F.3d 17 (D.C. Cir. 1999).

The District of Columbia Circuit for the U. S. Court of Appeals held that two orders by the Federal Energy Regulatory Commission (FERC) construing a provision of section 3(17) of the Federal Power Act to allow a "small power production facility" to use fossil fuels to supplement alternative fuels were an impermissible construction of the statute and could not stand.<sup>66</sup>

Under the Public Utilities Regulatory Policies Act of 1978 (PURPA), electricity facilities that engage in the production of electricity using fossil fuel alternatives, such as renewable resources and cogeneration of electricity, are exempt from certain regulatory controls.<sup>67</sup> PURPA also guarantees such facilities a market for their production by allowing the facilities to interconnect with and receive rates from the local public utility.<sup>68</sup> Facilities that qualify as a "small power production facility" defined by section 3(17) of the Federal Power Act, may be eligible for these entitlements.

Laidlaw, the owner and operator of Coyote Canyon Landfill Gas Power Plant that burns methane gas to generate electricity, had a purchase power contract with the Southern California Edison Company (Edison).<sup>69</sup> Laidlaw sought a declaratory ruling from FERC that its facility would continue to qualify as a "small power production facility" if it burned natural gas to boost its output in landfill gas in order to meet its contractual obligation to Edison.<sup>70</sup> Edison intervened in opposition to the petition.<sup>71</sup>

In a 1996 order, FERC determined that Laidlaw could use natural gas at its Coyote Canyon facility, but only for a maximum of 25 percent of its energy input, to equalize production and still qualify as a small power production facility.<sup>72</sup> In 1998, FERC clarified this order to mean that Laidlaw could use natural gas to levelize production "when burning natural gas will permit the facilities to

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66. See *Southern California Edison Co. v. Federal Energy Regulatory Comm'n*, 195 F.3d 17, 19 (D.C. Cir. 1999).

67. Pub. L. No. 95-617, 92 Stat. 3117 codified at 16 U.S.C. §§ 796(17)-(18), 824a-3, 824l, 824K (1994).

68. See *Southern California Edison Co.* 195 F.3d at 19.

69. See *id.* at 20.

70. See *id.* at 20-21.

71. See *id.* at 21. The Public Utilities Commission of the State of California also intervened in opposition. See *id.*

72. See *id.* at 22.

make more efficient use of their essential fixed assets.”<sup>73</sup> Thus, the FERC orders interpreted the term “small power production facility” in section 3(17) of the Federal Power Act to allow fossil fuels to be used to supplement the use of alternative fuels by such a facility.<sup>74</sup>

Edison appealed the Orders, arguing that FERC’s interpretation of the statute, which was that the statute allowed Coyote Canyon to burn up to 25 percent of its annual energy output, was contrary to the statute’s plain meaning.<sup>75</sup> Edison asserted that section 3(17) of the Act is unambiguous, that the permissible uses of fossil fuels by a small power production facility are limited to those set forth in the statute, and furthermore, that there existed no delegation of authority to FERC to broaden the category of permissible uses of fossil fuels by such facilities.<sup>76</sup> FERC contends that section 3(17)(B) is ambiguous and thus that under the *Chevron*<sup>77</sup> two-step test, the Court must defer to FERC’s reasonable interpretation of the statute.

The D.C. Circuit stated that under the *Chevron* two-step test, when the court reviews an agency’s construction of a statute, it must first determine whether Congress has addressed the precise question at issue.<sup>78</sup> If the court determines that Congress has not addressed the issue at hand, the second step comes into play and the court must defer to the agency’s reasonable interpretation of the statute.<sup>79</sup> The D.C. Circuit explained that “the statutory language is plainly crafted to allow fossil fuel use by small power production facilities for only a rather carefully defined set of exceptional uses” whereas “FERC applied an interpretation under which the fossil fuel uses may encompass essentially whatever FERC may find desirable in light of sound policy and the various statutory goals.”<sup>80</sup>

The D.C. Circuit first applied the analysis of step one of the *Chevron* test by examining the text, structure, and context of the statute.<sup>81</sup> The court concluded there was no need to move to step two of the *Chevron* analysis, because Edison had correctly construed the statute by “giving rather obvious meaning to all the words and phrases that Congress used, and leaving no ambiguity to resolve at

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73. *Id.* (quoting 1998 Order, 84 FERC at p. 61,296, (JA 236)).

74. *See id.* at 18.

75. *See id.* at 22.

76. *See id.*

77. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

78. *See Southern California Edison Co.*, 195 F.3d 22 (citing *Chevron U.S.A., Inc.*, 467 U.S. at 842).

79. *See id.* at 23.

80. *Id.* at 24.

81. *See id.* at 23.

step two of *Chevron*.<sup>82</sup> The D.C. Circuit thereby concluded that FERC's interpretation of the statute as in its 1996 and 1998 Orders was an impermissible construction of the statute.<sup>83</sup>

### III. FLORIDA DECISIONS

*Save the Manatee Club, Inc. v. Southwest Florida Water Management District*, Fla. Admin Order (Dec. 8, 1999) (on file with Clerk, Fla. Div. of Admin. Hearings).

The Florida Division of Administrative Hearings (DOAH) declared invalid a set of exemptions that, if granted, would allow a developer to avoid being subject to certain permitting criteria requirements.<sup>84</sup> DOAH held that the exemptions contained within rules issued by the Southwest Florida Water Management District (SWFWMD) were an invalid exercise of delegated legislative authority because the exemptions did not implement specific powers or duties in the SWFWMD's enabling legislation.<sup>85</sup> *Save the Manatee Club*, a non-profit manatee protection group, sought to prevent a developer, South Shores Property, from receiving the benefit of exemptions from permitting criteria.<sup>86</sup> The Club had filed a petition with DOAH seeking an administrative determination of the invalidity of paragraphs (3), (5) and (6) of Rule 40D-4.051 of the Florida Administrative Code, which contain the exemptions.<sup>87</sup>

South Shores proposed to develop 720 acres in Hillsborough County for a multi-phase, mixed-use project with boat access to Tampa Bay through an existing canal system.<sup>88</sup> For boats within the development to have access to Tampa Bay, however, an earthen berm or "plug" would have to be removed from the canal system.<sup>89</sup> The exemptions would allow South Shores to remove the "plug."<sup>90</sup> The plug is what most concerned the Club because its removal would allow increased motor boat access to Tampa Bay, a major

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82. *Id.* at 27.

83. *See id.* at 27.

84. *See Save the Manatee Club, Inc. v. Southwest Florida Water Management Dist.*, Fla. Admin. Order at 50 (Dec. 8, 1999) (on file with Clerk, Div. of Admin. Hearings).

85. *See id.*

86. *See id.* at 2-5.

87. *See id.* at 3.

88. *See id.* at 7.

89. *See id.*

90. *See id.* at 9.

habitat of the manatee.<sup>91</sup> Power boats can seriously injure manatees and essential elements of the manatee habitat.<sup>92</sup>

The decision by the ALJ focused on the Club's challenge to exemptions under the last four sentences of section 120.52(8), Florida Statutes, which is known as the "flush left" language, and provides that:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary or capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.<sup>93</sup>

The ALJ reviewed the First DCA's 1998 decision in *St. Johns River Water Management District v. Consolidated-Tomoka*,<sup>94</sup> and stated that with the 1999 amendments to the "flush left" language of section 120.52(8), the legislature rejected the "class of powers and duties analysis conducted in *Consolidated-Tomoka*."<sup>95</sup> Furthermore, the ALJ stated that the 1999 amendments make it clear that the rulemaking authority of administrative agencies is limited.<sup>96</sup>

The ALJ stated that the standard of the 1999 amendments, which provides that "[a]n agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling

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91. See *id.*

92. See *id.*

93. FLA. STAT. § 120.52(8) (1999).

94. 717 So. 2d 72, 79 (Fla. 1<sup>st</sup> DCA 1998) (holding that the terms "particular powers and duties" in the flush left language of section 120.52(8), Fla. Stat. (1997), restrict agency rulemaking authority to "subjects that are directly within the class of powers and duties identified in the enabling statute").

95. *Save the Manatee Club, Inc.*, Fla. Admin. Order at 47.

96. See *id.*

statute,"<sup>97</sup> must be applied.<sup>98</sup> The ALJ then examined the three statutory provisions, sections 373.406, 373.413, and 373.414(9), Florida Statutes (1999), that are cited in the rule containing the exemptions.<sup>99</sup> The ALJ concluded that none of the laws were specific enough to allow the South Florida Water Management District to adopt the rules containing the exemptions from application of permitting criteria.<sup>100</sup> The ALJ thus concluded that the exemptions contained in the rule were invalid exercises of delegated legislative authority.<sup>101</sup>

*Windward Marina v. City of Destin,*  
743 So. 2d 635 (Fla. 1<sup>st</sup> DCA 1999)

The First District Court of Appeal denied a petition for certiorari review of a circuit court order upholding the City of Destin's denial of Windward Marina's application for a development order.<sup>102</sup> The City of Destin had determined that the proposed development would be incompatible with surrounding uses with respect to boat traffic and denied the development order.<sup>103</sup> The First DCA stated that the only issue before it was whether the circuit court departed from the essential requirements of law by upholding the City of Destin's denial of the development order.<sup>104</sup> The City of Destin's comprehensive plan required that the city ensure the compatibility of surrounding land uses and provided that the compatibility of land uses is dependent on numerous characteristics, including nuisances.<sup>105</sup> In setting forth how compatibility of the proposed development is measured in relation to the surrounding area, the comprehensive plan listed "traffic generation" as one of the characteristics to be considered.<sup>106</sup> The City argued that "traffic" as used in the comprehensive plan included boat traffic, while Windward contended that boat traffic was not included in the definition.<sup>107</sup> Because neither the local ordinance nor the Growth

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97. FLA. STAT. § 120.52(8) (1999).

98. See *Save the Manatee Club, Inc.*, Fla. Admin. Order at 9.

99. See *id.* at 48.

100. See *id.*

101. See *id.* at 50.

102. See *Windward Marina v. City of Destin*, 743 So. 2d 635, 636 (Fla. 1<sup>st</sup> DCA 1999).

103. See *id.*

104. See *id.*

105. See *id.* at 637 (quoting City of Destin, Fla., Ordinance No. 151, Chapter 7, Policy 7.A.4.6.p. (1990)).

106. See *id.* (quoting City of Destin, Fla., Ordinance No. 151, Chapter 7, Policy 7.A.4.6.p. (1990)).

107. See *id.* at 636.

Management Act<sup>108</sup> defined "traffic," the First DCA looked to the Growth Management Act as a whole and determined that term applied only to land-based traffic.<sup>109</sup> However, the First DCA determined that the reference to "nuisances" in the ordinance indicates that the city will consider whether a proposed development is compatible with surrounding uses without constituting a nuisance.<sup>110</sup> The First DCA conceded that a local government's denial of a development order may not be based on criteria that are not specifically enumerated in the land use regulations.<sup>111</sup> The First DCA nevertheless concluded that the term "nuisance" was sufficiently concrete to be used by the city as a criterion in determining whether to approve an application for a development order.<sup>112</sup> Finally, the First DCA stated that it could not conclude that the circuit court departed from the essential requirements of law in upholding the city's denial of the development order.<sup>113</sup> The dissent expressed concern that the majority decision creates a "broad and nebulous exception to every zoning ordinance" that permits local governments to deny applications for development orders on a case-by-case basis.<sup>114</sup>

#### IV. NOTABLE PROPOSED LEGISLATION FROM THE 2000 FLORIDA LEGISLATURE

These summaries of proposed bills before the Florida Legislature are adapted from staff bill analyses located on the Legislature's website at <[www.leg.state.fl.us](http://www.leg.state.fl.us)>. The versions of the bills are current as of the date of the staff analyses, and no final action had been taken by the Florida Legislature at the time of this author's writing.

##### *CS/SB 758 Growth Management*

This bill, sponsored by Senator Lee, would create a 25-member commission to study Florida's current growth management system and make recommendations to the Governor, President of the

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108. FLA. STAT. § 163.3177 (1997).

109. See *Windward Marina* at 638.

110. See *id.*

111. See *id.*

112. See *id.* at 639.

113. See *id.* at 640.

114. *Id.* at 641.

Senate, and Speaker of the House of Representatives.<sup>115</sup> The Governor would appoint ten members, and the President of the Senate and Speaker of the House of Representatives would each appoint seven members.<sup>116</sup> The Secretary of the Florida Department of Community Affairs would serve as a member.<sup>117</sup> The measure identifies appropriate issues regarding state, local and regional planning for the commission to consider in making specific recommendations and provides that the commission must issue its final report by February 1, 2001.<sup>118</sup> Several acts and programs comprise the Florida growth management system.<sup>119</sup> The Local Government Comprehensive Planning and Land Development Regulation Act of 1985,<sup>120</sup> requires local governments to adopt a comprehensive land use plan to guide local development and land use.<sup>121</sup> Each local plan must be consistent with the state and regional comprehensive plans. Chapter 187 provides for a state comprehensive plan that is intended to guide long-range policy and planning for the orderly social, economic, and physical growth of the state.<sup>122</sup> Chapter 186 provides for the creation of eleven Regional Planning Councils that must adopt a strategic regional policy plan that is consistent with the state comprehensive plan.<sup>123</sup> The Development of Regional Impact (DRI) program created by chapter 380 of the Florida Statutes, provides for state, regional, and local review of proposed developments that because of their character, magnitude or location would have a substantial effect upon the health, safety or welfare of the citizens of more than one county.<sup>124</sup>

### *SB 1824 Sovereign Submerged Lands*

This bill, sponsored by Senator Campbell, addresses the controversy over lands the state claims as sovereign but that private property owners claim were deeded to them by the Board of Trustees of the Internal Improvement Trust Fund.<sup>125</sup> The bill would

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115. See Fla. S. Comm. on Comprehensive Planning, Local and Military Aff., CS for SB 758 (2000) Staff Analysis 1 (Feb. 7, 2000) (on file with comm.).

116. See *id.* at 3.

117. See *id.*

118. See *id.* at 4.

119. See *id.* at 1-2.

120. FLA. STAT. §163.3161-3244 (1999).

121. See CS for SB 758 (2000) Staff Analysis at 1.

122. See FLA. STAT. § 187.101 (1999).

123. See *id.* §§ 186.504, .507.

124. See *id.* § 380.06.

125. See Fla. S. Comm. on Judiciary, SB 1824 (2000) Staff Analysis 1 (Mar. 12, 2000) (on file with comm.).



confirm and validate titles of land conveyed to private landowners by the state that may have included sovereign lands.<sup>126</sup> Under the bill, private landowners would be able to make a claim of ownership of the lands provided that certain requirements are met. The landowner's title must be derived from a deed or grant issued by the Board of Trustees of the Internal Improvement Trust Fund.<sup>127</sup> The title must appear to be valid on its face and the lands transferred in the deed or grant must have been land that the issuing agency or official had the legal authority to convey.<sup>128</sup> The title must have been in private ownership since the original conveyance from the state and must have been put to a qualified agricultural use by a private party, or improved or developed.<sup>129</sup> The land conveyed must have been classified as property for ad valorem tax assessment purposes.<sup>130</sup> The bill does not affect the public's right to use any navigable waters for fishing, boating and swimming.<sup>131</sup>

#### *CS/SB 1694 Everglades Restoration*

This measure seeks to address the adverse environmental impacts upon the Florida Everglades that have been the unintended consequences of the Central and Southern Florida Project for Flood Control and Other Purposes that was first authorized by Congress in 1948.<sup>132</sup> A central feature of the bill is the creation of the Everglades Investment and Accountability Act, which recognizes that development within the South Florida Ecosystem has culminated in the reduction of natural water storage, the loss of fresh water, and other unintended adverse environmental impacts.<sup>133</sup> The bill intends that a comprehensive plan be implemented to be used as a guide for a continuing planning process with the goals of restoring, preserving and protecting the South Florida Ecosystem and the water quality of the Everglades.<sup>134</sup> The bill contemplates that implementation of such a plan will costs billions of dollars that should come from state funding sources to match any federal contributions.<sup>135</sup> It is further

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126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See id.*

132. *See* Fla. S. Comm. on Nat. Resources, CS for SB 1694 (2000) Staff Analysis 1 (Mar. 21, 2000) (on file with comm.).

133. *See id.* at 6.

134. *See id.* at 7.

135. *See id.*

contemplated that a partnership between the state and federal government will be established for the implementation of the plan.<sup>136</sup> The bill authorizes \$100 million in funds annually from the state and requires that the South Florida Water Management District (SFWMD) provide \$100 million in matching funds.<sup>137</sup> Under this measure the SFWMD and the Florida Department of Environmental Protection (DEP) must prepare detailed reports on the progress of the comprehensive plan and an accounting of all expenditures by the state in carrying out the project components.<sup>138</sup>

#### *CS/HB 659 Private Property Rights*

This measure, sponsored by Representative Alexander, amends the Bert J. Harris, Jr., Private Property Rights Protection Act.<sup>139</sup> In particular, the bill modifies the definitions of "action of a government entity" and "inordinate burden" to include any action by a governmental entity which involuntarily decreases the density of development below one residence for every five acres.<sup>140</sup> The modification to the term "inordinate burden" creates a rebuttable presumption that the governmental action at issue inordinately burdens the landowner's property.<sup>141</sup> Further, the bill provides that when a claim is filed for compensation, there is a rebuttable presumption that the government's action has inordinately burdened the landowner's property, and that the circuit court hearing the claim must determine whether the action did not inordinately burden the property.<sup>142</sup> These changes are designed to facilitate a property owner's ability to receive compensation under the Act.<sup>143</sup> The bill is designed prevent a reviewing court from using the standard of whether the landowner's reasonable, investment-backed expectations have been restricted or limited by the government action so as to require compensation to the landowner.<sup>144</sup>

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136. *See id.*

137. *See id.* at 7-8.

138. *See id.* at 8.

139. FLA. STAT. § 70.001 (1999).

140. *See* Fla. H.R. Comm. on Judiciary, HB 659 (2000) Staff Analysis 1 (Mar. 13, 2000) (on file with comm.).

141. *See* Fla. CS for HB 659, § 4(e) (2000).

142. *See id.* §§ 5(b), 6(a).

143. *See* HB 659 (2000) Staff Analysis at 4.

144. *See id.*

*SB 1848 Right to Farm Act*

This proposed bill, sponsored by Senator Kirkpatrick, would impose limitations on local government ability to restrict or regulate the use of land for agricultural purposes.<sup>145</sup> The bill would amend section 823.14 of the Florida Statutes,<sup>146</sup> and would prohibit local governments from limiting the use of land for growing or harvesting crops, plants or trees or for raising livestock or any other agricultural purposes.<sup>147</sup>

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145. See Fla. S. Comm. on Agric., SB 1848 (2000) Staff Analysis 2 (Mar. 16, 2000) (on file with comm.).

146. FLA. STAT. § 823.14 (1999).

147. See SB 1848 (2000) Staff Analysis at 2.

